86-1523

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RICHARD LAVERNE CHANDLER, Petitioner,

V.

RACHEL CHANDLER, Respondent.

PETITION FOR WRIT OF CERTIORARI AND FOR SUMMARY REVERSAL UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICHARD LAVERNE CHANDLER

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Petitioner Pro Se

95PP

QUESTIONS PRESENTED

1. Whether the Bankruptcy Amendments and Federal Judgeship Act of 1984, enacted July 10, 1984, was controlling law over petitioner's chapter 7 bankruptcy, filed July 30, 1984.

2. If said Act was controlling, whether District Court had exclusive jurisdiction over the chapter 7 proceeding and all property of petitioner's wherever located.

3. Whether a Bankruptcy Court has any jurisdiction over a bankruptcy proceeding, if the proceeding has not been referred to it by the District Court.

4. If the Bankruptcy Court had jurisdiction because of a proper referral of the proceeding, from the District Court, whether the Bankruptcy Court improperly determined that the instant case was a "core" proceeding.

5. If the Bankruptcy Court improperly determined that the instant case was a "core" proceeding, whether the case could even be properly considered as a "non-core" or otherwise related proceeding.

6. If the instant case could not properly be considered a "non-core" or otherwise related proceeding, whether the

Bankruptcy Court or the District Court should have abstained.

7. If the Bankruptcy Court, in the first instance, had no jurisdiction because the case was not referred to it by the District Court, whether the Court of Appeals had jurisdiction to review the judgement of the Bankruptcy Court.

8. Whether it is discretionary with a Court, when a court order has been violated, to deny a motion for civil contempt without allowing the damaged party a hearing to show that he has been damaged.

9. Whether the Bankruptcy Court is a Court of the United States.

10. If the Bankruptcy Court is not a Court of United States, whether the Bankruptcy Court is a court of competent jurisdiction to make findings or orders that qualifies a former spouse to receive direct payments of a portion of military retiree's retired pay, under 10 U.S.C. § 1408.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. _____

RICHARD LAVERNE CHANDLER, Petitioner,

v.

RACHEL CHANDLER, Respondent.

PETITION FOR WRIT OF CERTIORARI AND FOR SUMMARY REVERSAL
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

This petition for certiorari arises out of two appeals which were consolidated by the Court of Appeals for the Fifth Circuit, and as consolidated, affirmed. The first appeal, was from an order and judgment adverse to petitioner, rendered by the Bankruptcy Court. The second appeal was from a District Court order denying petitioner's motion for civil contempt, against respondent and the United States Army (Army), for violating a court ordered stay

during the pendency of the bankruptcy appeal. The petition is filed pro se by the petitioner Richard L. Chandler.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals for the consolidated appeals No. 85-1764 and No. 86-1178 (App. A, at a1 - a9) is not yet reported. Further opinions and orders, considered necessary for a decision of the petition for certiorari are as follows:

a. Order of the Court of Appeals denying Motion to Vacate Order and Dismiss Appeal and Motion for Contempt. (App. H at a40 - a43).

b. Order of the District Court affirming the judgment and order of the Bankruptcy Court. (App. E at a14 - a17). Not reported.

c. Order of the District Court denying Motion to Vacate Order and Dismiss Complaint, and Motion for Contempt. (App. I at a44 - a46). Not reported.

d. Order of the Bankruptcy Court that is the subject of Appeal No. 85-1764. (App. F at a18 - a36). Not reported.

JURISDICTION

The judgment of the Court of Appeals (App. B at a10) was entered December 9, 1986. A petition for rehearing with suggestion for rehearing en banc regarding appeal No. 85-1764, was denied January 14, 1987 (App. C at a11-a12). A petition for rehearing regarding appeal No. 86-1178, was denied on the same date. (App. D at a13). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS FEDERAL RULES OF CIVIL PROCEDURE AND BANKRUPTCY RULES INVOLVED

This case involves the following constitutional provisions, statutes, federal regulations, Federal Rules of Civil Procedure and Bankruptcy Rules: U.S. Const. art. III, amend. V; Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. 98-353, 98 Stat. 341; 28 U.S.C. §§ 1471 (Repealed), 1334, 451, 158, 157, 151; 11 U.S.C. §§ 523, 362; Uniformed Services Former Spouses' Protection Act, codified in 10 U.S.C. § 1408 and its implementing regulation 32 C.F.R. § 63; Federal Rule of Civil Procedure, Rule 43; and, Bankruptcy Rule, Rules 8009 and 8013. The full text of the foregoing are set forth in Appendix K.

CONCISE STATEMENT OF THE CASE

Petitioner filed chapter 7 bankruptcy July 30, 1984, seeking a fresh start; relief from business indebtedness; and relief from debt collection litigation that was ongoing in the State courts, with, among others, the respondent Rachel Chandler. Thereafter, the respondent stopped prosecuting her state-law claim for arrearages because of the automatic stay provisions of 11 U.S.C. § 362. However, she did not stop the action she had originated with the Army, for direct payment of a portion ($450.00) of petitioner's military retired pay, under the provisions 10 U.S.C. § 1408 and 32 C.F.R. § 63. Therefore, petitioner notified the Army of the bankruptcy filing and thereafter the Army discontinued the action it had originated upon respondent's application for direct payment.

With the foregoing factual background, the facts giving rise to this case can be summarized briefly. Respondent was unable to prosecute state-law claim for arrearages that arose from a divorce action, because of the automatic stay provided by 11 U.S.C. § 362. Therefore, she filed her claim for arrearages in the bankruptcy court, in a pleading

styled Notice of Objection to Discharge and Complaint to Determine Dischargeability and for Judgment, to which pleading she attached a copy of the State court divorce decree.

The said complaint specified no exception under 11 U.S.C. 523 (App. F at a25), just the claim for arrearages that had been filed in the State court. The complaint also sought an order from the Bankruptcy Court directing the Army to make direct payment of $450.00, per month, to the respondent. (App. F at a33). The Bankruptcy Court held a pretrial hearing December 4, 1984, at which time it made certain orders (App. F at a32) and thereafter the trial was held April 22, 1985. Respondent did not appear at either the pretrial hearing or trial. She did not testify in person, or by deposition and offered no evidence to support the allegations of her complaint. Upon trial, the Bankruptcy Court rendered judgment for respondent and held that: (1) $450.00, of each monthly retirement pay received by petitioner, beginning with the February 1983 payment, was property of respondent and said monies totaling $12,150.00 were excepted from discharge; (2) for reasons stated at the pretrial

hearing, petitioner should pay over to the Bankruptcy Court Clerk, the sum of $2,700.00; and, (3) that the Court had made the findings necessary for the Army to make direct payment of the said $450.00 to respondent. (App. F at a34 - a35). The Bankruptcy Court's order and judgment provided for a stay if the petitioner appealed. (App. F at a35) and (App. G. at a38). Petitioner appealed to the District Court per order of said Court in accordance with order of District Court. (App. J at a38).

The District Court affirmed the holding of the Bankruptcy Court and citing from Bankruptcy Rule 8013, held that a bankruptcy court's findings of fact are not to be set aside unless "clearly erroneous." (App. E at a16). The District Court's order affirming the Bankruptcy Court's order and judgment was appealed to the Court of Appeals for the Fifth Circuit in appeal No. 85-1764.

During the pendency of appeal No. 85-1764, the respondent requested, and the Army began to make direct payment to respondent, of the said $450.00, which act petitioner considered a violation of the stay ordered by the Bankruptcy Court (App. F at a35) and (App. G at a38).

Therefore, Petitioner filed a motion for civil contempt against the respondent and the Army, in the District Court. Also, petitioner considered that the Bankruptcy Court lacked jurisdiction to proceed to judgment in an ongoing domestic relations divorce matter for arrearages of funds, and, therefore petitioner filed a Motion to Vacate Order and Dismiss Complaint. Without a hearing, the District denied both motions. (App. I at a45). Petitioner appealed the denial of the Motion for Contempt to the Court of Appeals in appeal No. 86-1178, and submitted a Motion to Vacate Order and Dismiss Complaint to the Court of Appeals, urging the same jurisdictional question that had been urged in the District Court.

With regard to the Motion to Vacate Order and Dismiss Complaint, the Court of Appeals denied the motion and held that federal jurisdiction of the Bankruptcy Court was based on 28 U.S.C. 1471(e) which specified that "the bankruptcy court in which a case under Title 11 is commenced shall have exclusive jurisdiction of all property, wherever located, of the debtor as of the commencement of such case." (App. H at a43). No appeal was taken of the denial of said motion,

because the jurisdictional issue was again urged in petitioner's appellate brief in appeal No. 85-1764.

The Court of Appeals consolidated appeals No. 85-1764 and No. 86-1178, and as consolidated affirmed the respective orders of the District Court. The Court did not affirm the holdings of the District Court in either appeal. Instead, it decided them on different unique theories as follows:

1. In regards to No. 85-1764, the Court of Appeals held that because the $12,150.00, was sole separate property of respondent's, and reflected funds received after bankruptcy petition was filed, the provisions of 11 U.S.C. 523(a)(4) and 11 U.S.C. 523(a)(5) were not applicable to this case. (App. A at a8 - a9).

2. In further response to the jurisdictional issue that the Bankruptcy Court was not a court of competent jurisdiction under 10 U.S.C. § 1408, the Court of Appeals held that petitioner failed to show that the Bankruptcy Court's making that finding that was a prerequisite to direct payments under 32 C.F.R. § 63 (d), was clearly erroneous. (App. A at a8, see footnote 4).

3. In regards to No. 86-1178, the Court of Appeals simply held that the Army was not in contempt for paying funds to Mrs. Chandler, in accordance with Department of Defense's regulations. (App. A at a7, see footnote 3).

It appears, from the action of the courts below, and especially the appellate review by the Court of Appeals, that the Bankruptcy Amendments and Federal Judgeship Act of 1984 never existed. It also appears, that bankruptcy courts in the Fifth Circuit, are considered Courts of the United States when they adjudicate actions under the Uniformed Services Former Spouse' Protection Act, 10 U.S.C. § 1408. And, it appears that courts of the Fifth Circuit are not bound by the precedents of case law in matters pertaining to civil contempt. Therefore, certiorari is sought to review recurrent and important questions involving the conflicting administration of justice in federal courts directly regarding, (1) bankruptcy matters; (2) jurisdiction of Bankruptcy Courts in matters of exclusive jurisdiction; and, (3) matters concerning civil contempt, all of which conflicts should be resolved by this Court's exercise of its general supervisory authority.

REASONS FOR GRANTING CERTIORARI
Re: Appeal No. 85-1764

1. *Importance of the Case.* The Fifth Circuit, by its far-fetched interpretation and misapplication of the Bankruptcy Amendments and Federal Judgeship Act of 1984, (Act of 1984), or more correctly, its utter disregard of the basic provisions of the Act, has completely denied petitioner of his property in violation of his rights to due process of law as guaranteed by the Fifth Amendment of the United States Constitution, and has established an adverse precedent of fundamental importance to national bankruptcy litigation. No amassing of citations is required to establish that the Nation is confronted with an ever increasing number of bankruptcies, for businesses and individuals. In seeking an acceptable and just Bankruptcy Code, the Congress in response to this Court's decision in Marathon revised, amended and developed new provisions which it enacted to settle the jurisdictional crises created by Marathon. However, no amount of legislation, by the Congress, will effectively cope with the ever growing number of bankruptcies, if the intent and will of the Congress is allowed to be frustrated by the federal courts and judges who

may be disgruntled over particular provisions of the Act of 1984.

By its decision in this case, the Fifth Circuit has fundamentally departed, or more correctly ignored, the sound and established principles that have been incorporated in the current bankruptcy laws, which is of national importance.

2. *Conflict with This Court's Decision in Marathon.* The Fifth Circuit's decision represents a substantial departure from this Court's decision in Northern Pipeline Const. Co. v. Marathon Pipe Line Co. (1982) 458 U.S. 50, 73 L.Ed. 2d 598, 102 S.Ct. 2858. In Marathon, this Court made clear that a Bankruptcy Court's exercise of jurisdiction over state-law contract claims pursuant to 28 U.S.C. § 1471, was violative of Article III of the United States Constitution. (Marathon, supra, at 598). In response to the jurisdictional crises created by Marathon, the United States Congress responded with the Act of 1984. The Act of 1984, was enacted July 10, 1984, and is the controlling law over petitioner's bankruptcy case, which was filed July 30, 1984. The act of 1984, among other of its provisions, amended 28

U.S.C. § 1334, which became the jurisdictional section for all bankruptcy proceedings. The pertinent part of § 1334 is at App. K at a51. The relevant part of § 1334 and its application in the instant case is as follows:

a. § 1334(a) gives the District Court original and exclusive, jurisdiction of all cases under Title 11.

Application to this Case: Petitioner's attorney in the chapter 7 bankruptcy filed the bankruptcy petition with the Clerk of the Bankruptcy Court and not with the Clerk of the District Court. Such filing is assumed to have been in accordance with the provisions of the Local Rules.

b. § 1334(c) gives the District Court, exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate.

Application to this Case: Contrast what the law is, with what the Court of Appeals, says it is. In its response to petitioner's Motion to Vacate Order and Dismiss Complaint, a three judge panel of the Fifth Circuit held that federal jurisdiction in this case is based on 28 U.S.C. 1471(e) which specifies that the bankruptcy court in which a case

under Title 11 is commenced shall have exclusive jurisdiction of all property, wherever located, of the debtor as of the commencement of such case. (App H. at a43) The Fifth Circuit seems to be unaware of the fact that this Court declared 28 U.S.C. § 1471 violative of Article III of the United States Constitution, in 1982. (Marathon at 598) The Court of Appeals' decision is a disturbing one, both in its assertion of exclusive jurisdiction being vested in the Bankruptcy Court and because its authority for such assertion being a statute declared violative of Article III more than 4 years ago.

The fact that the Act of 1984 was completely ignored by: (1) the Court of Appeals; (2) the District Court for the Northern District of Texas, Lubbock Division; and, (3) its adjunct Bankruptcy Court, is obvious from an examination of the opinions, judgments and other orders which are at Appendix A - J, and their comparison with other provisions of the Act of 1984. The Act of 1984, created, among of others, two new sections which are 28 U.S.C. § 157 and 28 U.S.C. § 158. The pertinent part of § 157 and § 158 are at

(App. K at a52 - a54). The relevant parts of § 157 and § 158 and their application in the instant case are as follows:

a. § 157(a) provides that the District may provide that any or all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 shall be *referred* to the Bankruptcy Judges for the district.

Application to this Case: A Bankruptcy Court only has jurisdiction in a case that is *referred* to it. In the instant case, as was pointed out in petitioner's Petition for Rehearing En Banc, the District Court for the Northern District of Texas, Lubbock Division, has no order in its Local Rules that refer cases under Title 11 to its adjunct Bankruptcy Court. Therefore, under § 157(a) the District Court never vested jurisdiction, of any kind, in its adjunct Bankruptcy Court.

b. § 157(b)(1) provides that Bankruptcy Judges may hear and determine all cases under Title 11 and all "core" proceedings arising under Title 11 or arising in a case under Title 11, that have been *referred* to it by the District Court.

Application to this Case: Here again the operative word is *referred*. Since there was no referral order, the

Bankruptcy Court never had jurisdiction in this case and therefore had no jurisdiction to proceed to judgment.

c. § 157(b)(2) provides a "laundry list" of proceedings which are classified as "core" proceedings

Application to this Case: As has been shown, the Bankruptcy Court never had jurisdiction in this case, but, if it were assumed, arguendo, that the Bankruptcy Court had proper jurisdiction, the case could not be considered a "core" proceeding for the reasons stated by the Court of Appeals in its appellate opinion. The Court of Appeals held that the $450.00 monthly payments are respondent's sole separate property and not simply an obligation of petitioner's (App. A at a6). Since the property is respondent's sole separate property, it cannot be property of, or in the estate, of the petitioner's, nor can it have anything to do with the administration or liquidation of said estate. Hence, the proceeding was not a "core" proceeding by any definition under 28 U.S.C. § 157(b)(2).

d. § 157(b)(3) provides that the Bankruptcy Judge shall determined whether a proceeding is a "core" or a "non-core" or related proceeding.

Application to this Case: Again, if, for the sake of argument, it is assumed that the Bankruptcy Court had jurisdiction, it is obvious from an examination of the Bankruptcy Court's opinion (App. F at a18 - a36) that the Bankruptcy Judge determined that the instant case was a "core" proceeding under 11 U.S.C. § 157(b)(2). However, the Fifth Circuit held that 11 U.S.C. 523(a)(4) and 11 U.S.C. 523(a)(5) are not applicable to this case (App. A at a8) which would render the Bankruptcy Court's determination that the case was a "core" proceeding improper, and place in question whether the proceeding even qualified as a "non-core" or related proceeding.

e. § 157(c)(1) provides that a Bankruptcy Judge may hear and determine a "non-core" proceeding that has been properly referred to it, but, it may not render a final judgment in the case unless consented to by the parties. Rather the Bankruptcy Court must submit findings of fact and conclusions of law to the District Court for the entry of a final judgement.

Application to this Case: An examination of the Bankruptcy Court's opinion and judgment (App. F at a18 -

a36) and (App. G. at a37 - a39) and the order of the District Court (App. E at a14 - a17) conclusively shows that this case was improperly decided on the basis that this case was a "core" proceeding. The Court of Appeals determined that the exceptions defined in 11 U.S.C. § 523(a)(4) and § 523(a)(5) were not applicable in this case, which is conclusive that the proceeding was not a "core". At best, the proceeding was a "non-core" or related proceeding under § 157(c)(1), and petitioner was entitled to have a de novo review, by the District Court, of all matters objected to in his appellate brief. Also see 1616 Reminic Ltd. Partnership v. Atchison & Keller, 704 F.2d 1313, 1319 footnote 17 in accordance with § 157(c)(1). An examination of the District Court's Order (App. E at a14 - a17) clearly shows that it did not conduct a de novo review based on findings of fact and conclusions of law submitted to it as required by the provisions of § 157(c)(1) but that the Bankruptcy Court rendered a final judgment.

f. The pertinent parts of § 158 are at (App. K at a54). § 158(a) provides that District Courts of the United States shall have jurisdiction to hear appeals from final judgements,

orders and decrees entered in cases and proceedings referred to the Bankruptcy Courts under section 157 of Title 11.

Application to this Case: Here again, the operative word is *referred*. If, assuming arguendo, there was a valid referral order, it is clear that the District Court considered that it was reviewing a final order and judgment of the Bankruptcy Court, that had been rendered in a "core" proceeding, because of its order that petitioner strictly comply with Bankruptcy Rule 8009 (App. J at a47), and because it applied the "clearly erroneous" standard of review defined in Bankruptcy Rule 8013. Although Rule 8013 has no application to this case, because it is not a "core" proceeding, it is interesting to note how the District Court applied the provisions of Rule 8013 to this case. For clarity the full text of the Rule is repeated below as follows:

> On appeal the district court or bankruptcy appellate panel may affirm modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

It should be noted that the Rule itself places considerable importance in the Bankruptcy Court to judge the credibility of witnesses. Petitioner concurs with this well founded principle, but, fails to understand how the provisions of this Rule has any application in this case when respondent was not at trial to offer any testimony to support her claim and more importantly allow the Bankruptcy Court to judge her credibility.

In support of its order affirming the Bankruptcy Court's order and judgment, the District Court cited In re Osborne, 42 B.R. 988 (Bkrtcy. W.D. Wis. 1984). In Osborne, the Bankruptcy Court correctly states, that under the clearly erroneous standard, "as long as the judges' inferences are reasonable and supported by the evidence, they will not be disturbed." (Osborne, supra, at 995). The respondent did not appear at trial and with exception of attaching copy of divorce to her complaint, she offered no testimony to support her claim, and most assuredly did not offer evidence of the magnitude required to support her claim and prove her exceptions under 11 U.S.C. § 523(a)(4) and 11 U.S.C. § 523(a)(5). Finally, petitioner would direct this Court's

attention to the overall opinion in Osborne, because this opinion expresses petitioner's contentions regarding the provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984, in, perhaps, a more forceful and persuasive manner than petitioner is capable.

REASONS FOR GRANTING CERTIORARI

1. *Importance of the Case.* The Fifth Circuit, by its almost unconcerned decision on petitioner's appeal of District Court's denial of a motion for civil contempt, totally disregards the fundamental importance of civil contempt as a tool used by courts to inforce their orders and judgments. The nations judicial system would be in a quagmire of endless litigation if the courts could not effectively enforce their orders and judgments through civil or criminal contempt proceedings.

2. *Conflict with This Court's Decision in Jacksonville Paper Co.* The Fifth Circuit's decision represents a substantial departure from this Court's decision in McCombs v. Jacksonville Paper Co. 336 U.S. 187, 69 S.Ct. 497, 93 L.Ed. 599 (1949). This Court made clear in Jacksonville Paper Co., that in an action for civil contempt, if a court

order was violated, the grant or withholding of relief is not wholly discretionary with the judge. This Court also made clear, in said decision, that violation of the court order need not be willful. Jacksonville 69 S.Ct., supra, at 504. An examination of pertinent orders, judgments, and opinions in the appendix hereto shows that the holdings of Jacksonville were completely ignored and disregarded in the instant case. The court order violated is shown in (App. F at a35). For clarity the full text of the order violated as shown at 8a is restated below.

> 3. Richard Laverne Chandler be, and he is hereby, directed to pay to the Bankruptcy Clerk the sum of $2,700.00, representing the monthly payments of $450.00 each which have accrued since the pretrial hearing and if this order is appealed, he shall continue to make monthly payments of $450.00 each to the bankruptcy clerk until this order shall have become final or it shall be reversed and rendered
>
> 4. When this order and judgment based on this order have become final, the bankruptcy clerk pay over to Rachel Chandler the sum of $2,700.00 (or such larger sum which results from additional monthly payments if the order is appealed) representing the payments which Richard Chandler should have made to Rachel Chandler since November, 1984 * * *.

The stay ordered by the Bankruptcy Court, is clear, unambiguous and capable of compliance and could not be limited or modified short of its terms. If the respondent or the United States Army had doubts, as to the applicability of the order, they might have petitioned the Court for modification or construction of the order. Of course they did neither. The respondent, in violation of the stay, requested the Army to begin making direct payments to her in accordance with the order of the Bankruptcy Court and the Army, in violation of the stay, complied. (App. A at a8). These actions changed the status quo that was in place when the judgment and order were stayed by the Bankruptcy Court. Since the violation occurred after the District Court had affirmed the judgment and order of the Bankruptcy Court, the violation of the stay was a violation of the order of the District Court which affirmed the stay when it affirmed the order and judgment of the Bankruptcy Court (App. E at a14 - a17). Therefore, petitioner filed his motion for civil contempt, against respondent and the Army in the District Court. Even though this Court held that the granting or withholding of remedial relief was not discretionary

(Jacksonville S.Ct. at 504) the District Court and the Court of Appeals without hearing denied petitioner's motions for far-fetched reasons. The District Court held that, with respect to the motion for contempt, appellant seeks to argue on appeal what he failed to raise in the bankruptcy court. (App. I at a45) This does not seem to be a proper response to a motion for civil contempt. This Court held in Jacksonville, that the grant or withholding of remedial relief is not wholly discretionary with the judge (Jacksonville, supra, at 604, which implies that the judge cannot deny the motion without first holding a evidentary hearing in a manner prescribed by Rule 43(a), Federal Rules of Civil Procedure.

The Court of Appeals' response to petitioner's appeal of the District Court's denial of the motion for contempt was equally far-fetched and off the mark, as that of the District Court's. The Court of Appeals merely held that the Army was not in contempt for paying funds to Mrs. Chandler in accordance with the Department of Defenses regulations. This holding is a fundamental departure from the holding of this Court's in Jacksonville, supra at 604, which declared

that an act does not cease to be a violation of a decree merely because it may have been done innocently. Petitioner contends that the Department of Defense's regulations may be innocent regulations, but, if their enforcement is in violation of a court order, the person damaged because of their enforcement, is entitled to relief through a civil contempt action.

(c) *Conflict with Other Appellate Decisions.* In Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 130 the Second Circuit citing McComb, supra and John B. Stetson Co. v. Stephen L. Stetson Co., 128 F.2d 981 (2d Cir. 1942) it was held that civil contempt is not a discretionary matter; if a court order has been violated, the court must make the injured party whole. Which is to say, the party must be made whole through judicial proceedings to determine what amount will make the party whole. Because of the actions of the respondents and the Army, with the blessing of the Court of Appeals and the District Court, petitioner is not whole by more than $17,000.00 and that amount increases at a rate of $450.00 per month.

Additionally, the actions of the said Court, are a denial of petitioner's Fifth Amendment rights in that such rights in the $17,000.00 extend to that money by reason that petitioner was a trustee for receipt of the money for which the respondent and legal title of the money was not determined. (App. F at a29)

In Federal Deposit Ins. Corp. v. Morrison, 747 F.2d 610, the Eleventh Circuit held that the guarantee of due process extends to property rights less substantial than full legal title, whether they come from a private contract or state law; even a merely arguable right of possession constitutes property. (U.S.C.A. Const. Amends. 5). The Court further held that a person's interest in a benefit is a property interest for due process purposes if there are rules that support his claim of entitlement to the benefit and that he may invoke at hearing. (U.S.C.A. Const. Amends. 5). Petitioner attempted to invoke his entitlement in (1) a Motion for Contempt, but, the motion was denied by the Court of Appeals and the District Court. (App. A at a7 and I at a45); (2) in a bill of review (App. A at a3, footnote 1) but the Bankruptcy Court would not abstain so the claim could be

prosecuted in the state court, (App. F at a22, footnote 1); and, (3) in a Motion to Vacate each of Order and Dismiss Complaint. (App. H at a40). Everytime petitioner attempted to adjudicate his entitlement, it was the very judicial system that is to secure him that right, than ran rough shod over him and denied him that right.

REASONS FOR GRANTING CERTIORARI

Re: Bankruptcy Court Jurisdiction Under 10 U.S.C. § 1408

1. *Importance of the Case* . This case has far reaching effect on all military retirees that come under the jurisdiction of 10 U.S.C. 1408 and their right to have their case adjudicated by courts of competent jurisdiction regardless of the Federal Jurisdictional District in which their case is filed. The Uniformed Services Former Spouses' Protection Act has been codified in 10 U.S.C. 1408. The pertinent parts of the said statute are found at Appendix K. Under 1408(a)(1)(B) a "Court" is defined as any court of the United States as defined in 28 U.S.C. 451. Under § 1408(a)(2) a "Court Order" means, among other things, a court ordered, ratified or approved property settlement incident to such previously issued decree, which provides

for division of property and specifically provides for the payment of an amount, expressed in dollars, *from* the retired pay of a member *to* the former spouse.

In the instant case the Bankruptcy Court held that the Uniformed Services Former Spouses' Protection Act in (d)(2) provides for direct payment to the non-military spouse if the former spouse was married to the military spouse for ten years of service creditable in determining the military spouse's eligibility for retirement pay. It further held that the finding concerning the time that the former spouse was married to the service member was the only finding that it had to make for the Army to make all future payments of $450.00 out of each monthly check directly to the respondent. (App. F at a34). In accordance with that order the Army considered it a lawful modification of the term of the decree of divorce (App. E at a14-a15) which clearly states that the Army is to pay the $450.00 to the petitioner and petitioner was to pay the money over to respondent within five days of receiving the money from the Army. An examination of 32 C.F.R. 63.6(a)(2), see (App. K), shows that in order for the former spouse to be eligible for direct

payment, there must be a finding by court, of competent jurisdiction, regarding the years of marriage. In addressing the proprity of the Bankruptcy Court making such finding the Court of Appeals held that the Bankruptcy Court did not order the Army to make direct payments, it merely noted that the record indicated that petitioner and respondent were married 10 years of petitioner's military service. The Court of Appeals cuts a fine line, but, it is correct, it did not make an order. However, as is indicated by the Bankruptcy Court, in its order (App. F at a34) it need only make a "finding", which it did, and the Army acted on that finding in the same manner as it would if it were an order. (App. A at a8, footnote 4) The Court of Appeals also held that petitioner failed to show that this finding is clearly erroneous. It would be redundant to rehash the clearly erroneous standard being applied in this case, when the Fifth Circuit's own opinion shows that that standard has no application in this case. More important is the question, whether the Bankruptcy Court is a court of competent jurisdiction to make a finding that allows a former spouse to become eligible for direct payment of a portion of a retiree's

retired pay, when in the absence of such finding direct payment would not be made. In the first instance a Bankruptcy Court is not a "Court of the United States" under 28 U.S.C. 451 as required under the provisions 10 U.S.C. 1408(a)(1)(B). (Matter of Richardson 52 B.R. 527, 532). In the second instance when a court makes a finding which it lacks jurisdiction to make, that constitutes a clearly erroneous finding.

CONCLUSIONS AND PRAYER

The petition for certiorari should therefore be granted. In deed, so clear are the errors of the Court of Appeals for the Fifth Circuit and so clear are the denial of my Fifth Amendment rights to due process of law, that I believe the appropriate relief would be the summary reversal of the decision.

In the alternative, remand to the District Court, for further proceedings. In manner not unlike the remand order in Atchison & Keller at 1313.

APPENDIX A

United States Court of Appeals

For The Fifth Circuit

Nos. 85-1764, 86-1178

IN RE: RICHARD LAVERNE CHANDLER, Debtor.

RICHARD LAVERNE CHANDLER,

Plaintiff-Appellant,

versus

RACHEL CHANDLER,

Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, and WISDOM and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge; We are asked to decide whether a debtor in Chapter 7 Bankruptcy may discharge as debt the portion of his monthly Army retirement benefits awarded to his wife pursuant to a divorce decree. We conclude that the debtor may not discharge these monthly payments as debt because they are

the sole property of the debtor's former spouse. Accordingly, we affirm the judgments below.

I

On May 28, 1980, a Texas state court entered a decree of divorce terminating the marriage of Richard and Rachel Chandler. The divorce decree awarded Mrs. Chandler $450.00 per month from Mr. Chandler's monthly United States Army retirement benefits "as [Mrs. Chandler's] sole and separate property." In addition, the decree designated Mr. Chandler as trustee to receive the $450.00 awarded to Mrs. Chandler and remit it to her.

Mr. Chandler complied with the terms of the decree until June 1981, when he stopped paying the $450.00 to Mrs. Chandler. Mrs. Chandler argued that Mr. Chandler stopped making payments because of the Supreme Court's decision in *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981),[1] which held that the supremacy clause of the United States Constitution precludes a state court from dividing military nondisability retirement pay on divorce pursuant to the state's community property laws.

On September 9, 1982, in response to *McCarty*, Congress enacted the Uniformed Services Former Spouse's Protection Act, Pub.L. No. 97-252, 96 Stat. 730 (1982) (codified as amended at 10 U.S.C. § 1408 and other scattered sections). Under this act, for pay periods after June 25, 1981, a court may divide military retirement pay between spouses in accordance with the law in that court's jurisdiction. In addition, the Act and its accompanying regulations, 32 C.F.R. pt. 63, establish a procedure by which the Army can pay directly to the former spouse the portion of the service member's benefits awarded to the former spouse under a divorce decree. In 1983, Mrs. Chandler applied to the United States Army for direct payments of the $450.00. The Army notified Mr. Chandler that it would begin direct payments to Mrs. Chandler unless he contest the state court divorce decree. Accordingly, Mr.

[1] Mr. Chandler contended at trial that he ceased making payments when he learned that Rachel Chandler's prior marriage never had been dissolved. He later filed a bill of review in the state court to declare void his marriage of over thirty years to Mrs. Chandler, but the trial court has not rescinded the divorce judgment of May 28, 1980; therefore, the provisions in that judgment awarding Mrs. Chandler a portion of Mr. Chandler's Army retirement benefits remain valid.

Chandler filed a bill of review in state court to set aside the divorce decree. The Army, pursuant to the proposed regulations, then began to hold the $450.00 monthly Chandler filed a bill of review in state court to set aside the payments in escrow pending resolution of the state proceedings.

Meanwhile, Mr. Chandler filed for Chapter 7 bankruptcy in the United States Bankruptcy Court for the Northern District of Texas seeking to discharge debt to, among others, Mrs. Chandler. Pursuant to the automatic stay provisions of the bankruptcy code, the Army stopped collecting Mrs. Chandler's $450.00 payment in escrow, and Mr. Chandler began receiving the entire pension. Mrs. Chandler filed an objection to discharge, and the bankruptcy court rendered judgment in her favor, concluding that the $450.00 portion of the monthly payments was Mrs. Chandler's sole property. Thus, Mrs. Chandler was entitled to $450.00 from each future payment and was entitled to arrearages totaling $12,150.00 from February 1983 through

April 1985, the date on which the bankruptcy court rendered its decision. The court also ruled that the portion of the $12,150.00 not held in escrow by the Army and not forwarded to Mrs. Chandler by Mr. Chandler, was a nondischargeable debt under 11 U.S.C. § 523(a)(4) and 11 U.S.C. § 523(a)(5).[2] Mr. Chandler appealed the bankruptcy court's decision to the United States District Court for the Northern District of Texas, which affirmed.

After the bankruptcy court's ruling, the Army again began to withhold the $450.00 from Mr. Chandler's monthly benefits. In addition, the Army notified Mr. Chandler that under the revised regulations it would suspend payments to a former spouse only if the court issued a stay of execution; contesting the order was no longer sufficient to suspend payments. The Army thereafter released the funds to Mrs. Chandler. It has continued to make payments directly to Mrs. Chandler because there never has been a stay of execution.

II

Mr. Chandler argues that Mrs. Chandler failed to amend her complaint within the time requirements of the bankruptcy

code to include claims under § 523(a)(4) and § 523(a)(5), that in any event Mrs. Chandler's claims under these provisions were not supported by substantial evidence, that the district court abused its discretion, and that the district court's findings of fact were clearly erroneous.[3] Mr. Chandler also asserts that the bankruptcy court lacked jurisdiction to determine that Mrs. Chandler qualified for direct payments from the Army.

We are persuaded that Mrs. Chandler's position in her original complaint, that the $450.00 monthly payments are her sole property and not simply an obligation of Mr. Chandler's, is correct. The divorce decree awarded Mrs. Chandler $450.00 per month from Mr. Chandler's monthly army retirement benefits "as [Mrs. Chandler's] sole and

[2] These provisions state: A discharge under ... this title does not discharge an individual debtor from any debt—

....

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or other order of a court of record or property settlement agreement...

11 U.S.C. § 523(a)-(b) (1979 & Supp. 1986).

separate property," which is permissible under Texas law. *See Cearley v. Cearley* , 544 S.W.2d 661, 666 (Tex.1976). The Supreme Court subsequently held that the supremacy clause of the Constitution precludes a state court from dividing military nondisability retirement pay pursuant to a state's community property laws. *See McCarty v. McCarty* , 453 U.S. 210, 235, 101 S.Ct. 2728, 2742, 69 L.Ed.2d 589 (1981). Nevertheless, *McCarty* does not apply retroactively to divorce decrees that were final before the decision. *Segrest v. Segrest*, 649 S.W.2d 610, 613 (Tex.1983). Thus, the 1980 decree awardiing Mrs. Chandler monthly payments from Mr. Chandler's Army retirement pay remains valid, and Mr. Chandler cannot discharge as debt any payments arising after the filing of his bankruptcy decision.

Furthermore since Mrs. Chandler does not seek payment for arrearages that Mr. Chandler withheld before

[3] Mr. Chandler also filed a motion for contempt in the district court claiming that the Army and Mrs. Chandler failed to comply with the stay pending appeal, which the bankruptcy court allegedly included in its order. The district court denied the motion, as did a panel of this circuit. In any event, the Army was not in contempt for paying funds to Mrs. Chandler in accordance with the Department of Defense's regulations.

filing his bankruptcy petition, we need not address Mr. Chandler's contentions regarding § 523(a)(4) and § 523(a)(5).[4] Mrs. Chandler waived her claim to payments before February 1983. The $12,150.00 bankruptcy court award represented payments owing from February 1983 through April 1985. The Army had withheld fourteen of those payments totaling $6,300.00 during the pendency of the bankruptcy action. After judgment, the Army paid that sum to Mrs. Chandler, and Mr. Chandler was credited with the fourteen payments from February 1983 to April 1984. Mrs. Chandler also waived her claim to payments for May, June, July, and August of 1984, leaving only $4,050.00 of payments owing after the filing of the bankruptcy petition. Mrs. Chandler now seeks only the $2,700.00 Mr. Chandler deposited into the bankruptcy court's registry pursuant to the court's order. Since all of

[4] Mr. Chandler's other contentions are without merit. He argues that the bankruptcy court was not a competent court, and without jurisdiction, to find that Mr. and Mrs. Chandler were married during at least 10 years of Mr. Chandler's military service, which is a prerequisite to direct payments under 32 C.F.F. § 63.3(d). The bankruptcy court, however, did not order the Army to make direct payments. The court

that amount, as we have held, is Mrs. Chandler's property and reflects funds received after the bankruptcy petition was filed, 11 U.S.C. § 523(a)(4) and 11 U.S.C. § 523(a)(5) are not applicable. The judgment is AFFIRMED.

simply noted that the record indicated that Mr. and Mrs. Chandler were married at least 10 years of Mr. Chandler's military service. Mr. Chandler fails to show that this finding is clearly erroneous. In addition, there is no support for Mr. Chandler's contentions that the district court abused its discretion in upholding the bankruptcy court's ruling and that the district court's findings are clearly erroneous.

APPENDIX B

United States Court of Appeals

For The Fifth Circuit
Nos. 85-1764 and 86-1178
D.C. Docket No. CA-5-85-120

IN RE: RICHARD LAVERNE CHANDLER, Debtor.

RICHARD LAVERNE CHANDLER,
Plaintiff-Appellant,
versus
RACHEL CHANDLER,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, WISDOM, and HIGGINBOTHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel for appellee, and taken under submission on the briefs of appellant.

ON CONSIDERATION WHEREOF, It is now here ordered and and judged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

December 9, 1986

ISSUED AS MANDATE:

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1764

IN RE: RICHARD LAVERNE CHANDLER, Debtor

RICHARD LAVERNE CHANDLER,

Plaintiff-Appellant,

versus

RACHEL CHANDLER,

Defendant-Appellee.

Appeal from the United States District Court for the

Northern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 9, 5 Cir., 1986 _____F.2d_____)

(January 14, 1987)

Before CLARK, Chief Judge, WISDOM and HIGGINBOTHAM, Circuit Judges.

a11

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:
/s/ Patrick E. Higginbotham
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-1178

IN RE: RICHARD LAVERNE CHANDLER, Debtor,

RICHARD LAVERNE CHANDLER,
Plaintiff-Appellant,

versus

RACHEL CHANDLER,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING

(January 14, 1987)

Before CLARK, Chief Judge, WISDOM and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and number cause be and the same is hereby denied

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
United States Circuit Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

IN RE: RICHARD LAVERNE CHANDLER	)	BANKRUPTCY NO. 584-50184
RICHARD LAVERNE CHANDLER	)	ADVERSARY NO. 584-5105
v.	)	CIVIL ACTION NO. CA-5-85-120
RACHEL CHANDLER	)	

ORDER

This is a bankruptcy appeal. Pursuant to the divorce decree granted to the parties on May 28, 1980, Appellee Rachel Chandler was granted a portion of Appellant Richard Chandler's military retirement pay. The decree provided in pertinent part as follows:

> The Court having found that Respondent (Richard Chandler) is retired from the United States Army and is currently receiving United States Army retirement pay on a monthly basis, and that such retirement pay constitutes vested contingent [sic] community property, Petitioner Rachel Chandler] is therefore awarded the sum of FOUR HUNDRED FIFTY DOLLARS ($450.00) per month from Respondent's monthly retirement pay if, as and when such benefits are paid to Respondent and Respondent shall hereafter remit to Petitioner the sum of FOUR

> HUNDRED FIFTY DOLLARS ($450.00) from such retirement benefits, and Respondent is hereby constituted a trustee for the purpose of receiving said sum of money hereinabove awarded to Petitioner and Respondent shall immediately upon receipt thereof, and not more than (5) days after such receipt, remit said sum to Petitioner.

[Exhibit "A", pp. 2, 3].

Appellant regularly paid the appellee $450.00 each month until July of 1981. The evidence shows that he stopped payment at that time because of one or both of the following reasons: (1) defendant learned of the United States Supreme Court's opinion in McCarty v. McCarty, 453 U.S. 210 (1981); (2) that appellee never obtained a proper divorce in Mexico from her first husband thus causing the parties' marriage to be a nullity.

Appellant has since filed a petition in bankruptcy. As a result, appellee filed suit to except the $450.00 from the appellant-debtor's discharge.

To avoid a discharge in bankruptcy, a creditor's allegations must fit within one of the exceptions contained in § 523 of the Bankruptcy Code.

At trial, appellee claimed that appellant committee fraud

and defalcation while acting as a fiduciary for appellee's $450.00 portion of appellant's monthly retirement pay. This allegation fits § 523(a)(5) of the Code.

Appellant claims, however, that the $450.00 monthly payment is a property settlement and therefore is dischargeable in bankruptcy.

Bankruptcy Rule 8013 provides that a bankruptcy court's findings of fact are not to be set aside unless "clearly erroneous." This court may not reweigh the evidence and cannot disturb the bankruptcy court's ruling unless there has been an abuse of discretion. See In re Osborne, 42 B.R. 988, 994 (Bkrtcy. W.D. Wis. 1984).

The Bankruptcy Court found $450.00 of appellant's monthly military retirement award was appellee's separate property, and therefore, that it was unnecessary to address the § 523(a)(4) exception to discharge. Furthermore, the court stated that even if appellee's ownership in the retirement award could not be determined so that the fiduciary exception applied, appellee would prevail on that

exception, § 523(a)(4). In addition, the court found that appellee's portion of the award also could be upheld as non-dischargeable support according to § 523(a)(5).

This court has reviewed the record of proceedings in the bankruptcy court and finds no abuse of discretion in that court's rulings.

Accordingly, the ruling of the bankruptcy court in Adversary No. 584-5105 is AFFIRMED.

The Clerk will furnish a copy hereof to each attorney of record and all necessary parties.

ENTERED this 31st day of October, 1985.

/s/ Halbert O. Woodward
HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

APPENDIX F

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

IN RE:	§	
	§	
RICHARD LAVERNE CHANDLER,	§	NO. 584-50184
	§	
DEBTOR	§	
	§	
RACHEL CHANDLER,	§	
	§	
PLAINTIFF	§	
	§	
VS.	§	ADVERSARY NO. 584-5105
	§	
RICHARD LAVERNE CHANDLER,	§	
	§	
DEFENDANT	§	

MEMORANDUM AND ORDER

Rachel Chandler, the former wife of the debtor, Richard Laverne Chandler, filed complaint seeking to except an alleged debt from the debtor's discharge. She argues that a portion of a military retirement award made each month to the debtor is her separate property, that it is neither property of the estate nor property of the debtor, and that the debtor merely serves as trustee for her benefit over those funds. She seeks an order, directing the United States Army to

make payment of her portion of the award directly to her each month as the payment becomes due. The following summary constitutes findings of fact and conclusions of law.

The parties announced some stipulations at the time of the pretrial conference on December 4, 1984. Rachel Chandler and Richard Laverne Chandler were married in Juarez, Mexico, on October 17, 1949. Richard Laverne Chandler was a member of the military service from the time of the marriage until August 20, 1968, when he retired from the United States Army with the commissioned rank of major and with entitlement to a retirement award after twenty years service. At the time of the hereinafter mentioned divorce decree the amount of that entitlement approximated $1,200.00 each month.

On May 28, 1980, the 41st District Court of El Paso County, Texas, entered decree of divorce in cause number 77-1540, terminating the marriage between Rachel Chandler and Richard Laverne Chandler. The divorce decree provided, among other things, the following:

> Petitioner is therefore awarded the sum of $450.00 per month from the respondent's

> military repayment pay, if, as, and when such benefits are paid to respondent and respondent shall hereafter remit to petitioner the sum of $450.00 from such retirement benefits and respondent is hereby constituted as trustee for the purpose of receiving said sum of money hereinabove awarded to petitioner and respondent shall immediately upon receipt thereof, and not more than five days after such receipt, remit said sum to petitioner.

In awarding a fraction of the military retirement payment to Rachel Chandler the trial court followed a number of Texas Supreme Court decisions approving such division upon divorce. See Taggart v. Taggart, 552 SW2d 422 (Tex. 1977); Cearley v. Cearley, 544 SW2d 661 (Tex. 1976); Busby v. Busby, 457 SW2d 551 (Tex. 1970); Herring v. Blakely, 385 SW2d 843 (Tex. 1965). Under those decisions military retirement benefits earned by either spouse during the marital relationship were considered part of the community estate and thus subject to division upon the dissolution of the marriage. For instance, the Supreme Court in Cearley had stated that retirement and pension plans are a mode of employee compensation and therefore, pursuant to § 5.01 of the Texas Family Code, are

community property.

After the trial judge entered the divorce decreee in this case on May 28, 1980, the debtor, Richard Laverne Chandler, initially complied with the requirements that he, as trustee, should account to Rachel Chandler for $450.00 of the retirement benefits each month. However, on June 26, 1981, the United States Supreme Court, in McCarty v. McCarty, 453 U.S. 210 (1981) held that the Supremacy Clause of the United States Constitution, Article VI, precludes a state court from dividing military nondisability retirement pay on divorce. In McCarty the Supreme Court concluded that a state could not apply its community property laws to nondisability military retirement compensation. Further, the Texas Supreme Court, following the mandate of McCarty, held that not only was the trial court unable to apportion nondisability retirement benefits upon divorce it could not even consider such military retirement in its apportionment of the community estate. Trahan v. Trahan, 626 SW2d 485 (Tex. 1981).

The debtor read the newspaper accounts and discovered

the thrust of McCarty as announced by the United States Supreme Court on June 26, 1981. He made no additional payments to Rachel Chandler[1] and since July 1981 he has received the full pension payment each month and has used it for his own purposes. No accounting to Rachel Chandler has been made for any portion of those payments which are owned by her.

McCarty caused some consternation in Congress. On September 9, 1982, the President signed into law the Uniformed Services Foirmer Spouse's Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (1982), codified in Title 10, United States Code §1408 et seq. The obvious purpose of the Act was to reverse the effect of McCarty. Texas courts have so treated the Act as effecting that intent. Cameron v. Cameron, 641 SW2d 210, 212 (Tex. 1982). Under the Act

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[1] At trial, and in his trial briefs, debtor argues that he had not ceased making the payments to his former wife on the strength of McCarty, but that about that time he discovered that his marriage of more than thirty years to Rachel Chandler was void due to an undissolved prior marriage of Rachel Chandler. He has filed a bill of review in the state court to declare that marriage void. In any event the trial court has not rescinded the judgment of May 28, 1980,

and the provisions in that judgment for the monthly payments to be made to Richard Laverne Chandler as trustee for the benefit of Rachel Chandler remain valid and is the basis for the dischargeability action.

the Texas trial court may divide military retirement pay between the spouses in accordance with the law of the jurisdiction of that Court. The Act limits the division of retirement pay to periods beginning after June 25, 1981. See Title 10 United States Code §1408(c)(1).

Thus the pre-McCarty law in Texas has been resurrected. All benefits which are received from military retirement after June 25, 1981, may be divided as community property by the state divorcing courts.

I find that each of the monthly retirement payments received by the debtor, Richard Laverne Chandler, since June 26, 1981, included $450.00 which was the property of Rachel Chandler and which Richard Laverne Chandler had received as trustee for her benefit. The amount of Rachel Chandler's money which Richard Laverne Chandler has received and not disbursed to her totals $21, 150.00. However, Rachel Chandler, through her attorney, announced in open court that she recognizes the impecunious

state of Richard Laverne Chandler and thus will insist upon recovering only those payments of $450.00 each month which have become due commencing with the February 1983 installment. Therefore, the amount of the nondischargeable debt which she seeks to recover is the sum of $12,150.00

The determination of the amount of debt, however, does not end Rachel Chandler's burden. She still must establish that the debt should be excepted from the discharge of Richard Laverne Chandler. In that regard the Code sections governing discharge must be construed liberally in favor of the debtor and strictly against the challenger. Gleason v. Thaw, 236 U.S. 558 (1915); Matter of Love, 577 F2d 344, 349 (5th Cir. 1978); Matter of Jones, 490 F2d 452 (5th Cir. 1974); Spach v. Strauss, 373 F2d 641 (5th Cir. 1967). Accordingly, the burden of proof lies with the objecting creditor to demonstrate that the particular debt falls within one of those statutory exceptions. Danns v. Household Finance Corporation, 558 F2d 114, 116 (2nd Cir. 1977). Objection to the dischargeability of a particular indebtedness

must be based on one of the specified grounds contained in §523 of the Code. Unless an objecting creditor can bring himself with the language of the section a general charge of dishonest conduct by the debtor does not suffice. Matter of Love, supra at 349.

In her original complaint Rachel chandler had not set out with specificity the particular exceptions of §523 upon which she was relying for her contention that the debt should be excepted from the discharge of Richard Laverne Chandler. However, in her pretrial briefs and at the trial she argued the applicability of two exceptions. She contends that Richard Laverne Chandler, while acting in a fiduciary capacity, has committed fraud or defalcation within the meaning of §523(a)(4) of the Code. Alternatively, she contends that the court's award constituted nondischargeable support within the meaning of §523(a)(5) of the Code.

The "fiduciary" concept is a difficult burden for Rachel Chandler to establish. The Supreme Court of the United States, in Chapman v. Forsythe, 43 U.S. (2 How) 202 (1844) made it clear that under the Bankruptcy Act the

concept of fiduciary should be narrowly defined:

> In almost all the commercial transactions of the country confidence is reposed in the punctuality and integrity of the debtor and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the Bankruptcy Act... the Act speaks of technical trusts and not those which the law implies from the contract.

Subsequently, the Supreme Court refined and narrowed the Chapman concept of "fiduciary". It made clear that the technical trust required by Chapman must exist prior to the act creating the debt and must exist without reference to that act. See Upshur v. Briscoe, 138 U.S. 365 (1891). As the Supreme Court stated in Davis v. Aetna Acceptance Company, 293 U.S. 328, 333 (1934);

> . It is not enough that by the very act of wrongdoing out of which the contested debt arose the bankrupt has become chargeable as a trustee ex maleficio. He must have been a trustee before he wrong and without reference thereto.

In order to apply the §523(a)(4) exception, both federal and state law must be analyzed. State law is applied in determining when a truste exists. The state may impose trust-like obligations on those entering into certain kinds of

contracts and those obligations may make a contracting party a trustee. See Matter of Angelle, 610 F2d 1335, 1341 (5th Cir. 1980). In this particular case the state court has in fact determined that a trust exists by so defining it in the divorce decree. However the scope of the "fiduciary" concept under §523(a)(4) is a question of federal law. Regardless of how a state defines "fiduciary" the Chapman/Davis definition applies in cases involving §523(a)(4). That is, the concept, for dischargeability purposes, is limited to technical trusts which existed prior to the challenged wrong and without reference to that wrong. Angelle, supra at 1341.

In this case I can find that a technical trust did in fact exist prior to the challenged wrong and without reference to that wrong. The debtor dutifully complied with his court-ordered obligations as trustee from the time of entry of the divorce decree until he learned of the McCarty decision. He received the monies as trustee during that interim and timely delivered each $450.00 portion belonging to Rachel Chandler over to her. I cannot find that he violated his fiduciary obligation by initially following McCarty, because

McCarty did in fact abrogate pre-existing Texas law and his obligation to make the $450.00 payments to Rachel Chandler. However, his duties to account to the beneficiary of the trust for her portion of the property of the parties was reinstated by the Uniformed Services Former Spouse's Protection Act. After the effective date of that act his failure to pay those monies over to her constituted an abrogation of his fiduciary duty. All of those monies to which Rachel Chandler would have been entitled totalling $21,150.00 which have been received by the debtor, Richard Laverne Chandler, since June 25, 1981, the effective date of the act, should be excepted from Chandler's discharge. However, as mentioned above Rachel chandler has waived some of those monies and insists upon the recovery of only $12,150.00. It is clear that to the extent of those monies the debtor, Richard Laverne Chandler, has committed fraud or defalcation within the meaning of §523(a)(4). See also Neese v. Neese, 669 SW2d 388 (Tex. Civ. App.-Eastland 1984, no writ).

Since Rachel Chandler owned as her separate property

that sum of $450.00 which was a portion of the retirement award received by the debtor each month it is not necessary to address the §523(a)(4) exception to discharge. However, even if the "ownership" issue could not be resolved in her favor so that the "fiduciary" exception applied, Rachel chandler would prevail on her contention that the $450.00 per month award from the military retirement constitutes a nondischargeable debt within the meaning of §523(a)(4). In that regard, the bankruptcy court, in determining whether an award constitutes "nondischargeable support" must first ascertain whether the state court or the parties to the divorce intended the award to provide support. Defining of intent, however, does not control the ultimate issue and the second determination is whether the award was actually in the nature of support...that is, whether the terms of the agreement or decree appear to be designed to satisfy a duty of support. See In re Nunnally, 506 F2d 1024 (5th Cir. 1975); In re Haney, 33 B.R. 6 (Bkrtcy. N.D. Ala. 1983).

It is a well established principle that the classification of the nature of a debt as a support obligation or a part of a

property settlement is a question of federal bankruptcy law and not state law. H.R. Rep. No. 595, 95th Cong. 1st Sess. 364 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 79 (1978); U.S. Cong. Admin. News 1978, p. 5787. However, Congress could not have intended that the bankruptcy courts ignore well developed state law principles of domestic relations in determining whether a particular debt is "in the nature of support" for purposes of the Code. The factors to be considered in determining whether the award was intended as support include:

1. Whether children were born of the marriage;

2. The parties respective levels of income;

3. Whether there was a division of property and a division of debts relating thereto;

4. Whether the former spouse had shown a need for support at the time of divorce;

5. Whether the former spouse was shown, at the time of divorce, to have suffered in the job market or was otherwise disadvantaged because of any dependent position held in relation to the debtor during the marriage;

6. The age and health of the former spouse;

7. The economic disparity between the parties; and

8. Whether the terms of the settlement agreement indicated that the obligation was support rather than a property division. See In re Wellman, 32 B.R. 974 (Bkrtcy. N.D. Ill. E.D. 1983); In re Cartner, 9 B.R. 543 (Bkrtcy. M.D. Ala. 1981).

No one of the above factors is determinative of the issue and the totality of the circumstances must be considered.

At the time of divorce Richard Laverne Chandler was a person of apparent good health who was capable of obtaining and maintaining gainful employment. He had completed twenty years service in the United States Army and had retired from the army as a major with a monthly retirement award, on the date of the divorce, approximately $1,200.00. On the other hand Rachel Chandler, while apparently having had some education in the school systems in Mexico, was essentially uneducated. She had no job training and had been unemployed for thirty years. That her capacity to obtain and maintain gainful employment was

minuscule when compared with that of her former husband, Richard Laverne Chandler, is exemplified by the fact that since the divorce she has worked part-time as a cleaning lady at a community hospital. She had a compelling need for support at the time of the divorce and thereafter. No equitable conclusion could be made other than that the $450.00 per month award which the trial judge provided for Rachel chandler was for support.

For each of the above reasons, singly and collectively, I conclude that $450.00 of each monthly retirement award received by Richard Laverne Chandler, commencing with the February 1983 payment, is property of Rachel Chandler which he should have paid over to Rachel Chandler and that the debt represented by those monies totalling $12,150.00 should be excepted from the discharge of Richard Laverne Chandler. At the pretrial conference I had announced in open court that Richard Laverne Chandler, commencing with the November 1984 retirement payment, should pay over to the trustee of his estate the sum of $450.00 to be held by the bankruptcy trustee, pending resolution of the

dischargeability issue. He did not make those monthly payments to the trustee. However, at the trial on April 22, 1985, he tendered a check in the sum of $2,700.00, representing the total of those payments. Those payments totalling $2,700.00 shall be paid into the registry of this Court, to be held by the clerk until this order, and the judgment based on the order, becomes final. If this order is appealed he shall continue to pay into the registry of this court that sum of $450.00 each month until this order and the judgment based on the order are made final or is reversed. If this order and the judgment become final the clerk shall pay over those accumulated monies to Rachel Chandler and Richard Laverne Chandler shall be entitled to a credit on the nondischargeable judgment in the amount of the $2,700.00 payment.

Rachel Chandler seeks also an order from this Court directing payment by the United States Army to her of her portion of $450.00 of each retirement check. The Uniformed Services Former Spouse's Protection Act in §(d)(2) provides for direct payment to the non-military

spouse if the former spouse was married to the military spouse for ten years during which the military spouse performed ten years of service creditable in determining the military spouse's eligibility for retirement pay. The record reflects that Rachel Chandler in fact was married to Richard Laverne Chandler for more than ten years while he was serving in the United States Army. The attorney for Rachel Chandler announced in open court that that finding was all that was required for the United States Army to change its records and to make all future payments of $450.00 out of each monthly check directly to Rachel Chandler. Therefore, I have made all findings necessary for the payment directly to Rachel Chandler by the United States Army.

It is, therefore, ORDERED by the Court:

1. Rachel Chandler do have and recover of and from Richard Laverne Chandler the sum of $12,150.00, with interest from date at the rate of 9.15% per annum, the Coupon Issue Yield Equivalent;

2. The debt for the above amount so recovered by Rachel Chandler against Richard Laverne Chandler be, and it

is hereby, declared nondischargeable;

3. Richard Laverne Chandler be, and he is hereby, directed to pay to the Bankruptcy Clerk the sum of $2,700.00, representing the monthly payments of $450.00 each which have accrued since the pretrial hearing, and, if this order is appealed he shall continue to make monthly payments of $450.00 each to the Bankruptcy Clerk until this order shall have become final or is reversed rendered.

4. When this order and the judgment based on this order have become final the Bankruptcy Clerk pay over to Rachel Chandler the sum of $2,700.00 (or such larger sum which results from additional monthly payments if this order is appealed), representing the payments which Richard Laverne Chandler should have made to Rachel Chandler since November 1984; and

5. Those monies totalling $2,700.002, when received by Rachel Chandler from the clerk, shall be credited against the nondischargeable judgment based on this memorandum and order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

The Clerk is directed to file this Memorandum and Order and to furnish a copy to the attorneys of record.

Entered this 26th day of April, 1985.

/s/ Bill H. Brister
BANKRUPTCY JUDGE

---

[2] Only $2,700.00 shall be credited against the judgment, because any additional payments made by debtor to the clerk will represent payments of amounts which otherwise would increase the amount of the judgment.

APPENDIX G

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

IN RE:	§	
	§	
RICHARD LAVERNE CHANDLER,	§	NO. 584-50184
	§	
DEBTOR	§	
	§	
RACHEL CHANDLER,	§	
	§	
PLAINTIFF	§	
	§	
VS.	§	ADVERSARY NO. 584-5105
	§	
RICHARD LAVERNE CHANDLER,	§	
	§	
DEFENDANT	§	

JUDGMENT

The Court has this day entered Memorandum and Order, concluding that a nondischargeable judgment should be entered in favor of Rachel Chandler against Richard Laverne Chandler for that portion of the retirement award which he should have paid over to her each month.

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that:

1. Rachel Chandler do have and recover of and from

Richard Laverne Chandler the sum of $12,150.00, with interest from date at the rate of 9.15% per annum, the Coupon Issue Yield Equivalent;

2. The debt for the above amount so recovered by Rachel Chandler against Richard Laverne Chandler be, and it is hereby, declared nondischargeable;

3. Richard Laverne Chandler be, and he is hereby, directed to pay to the Bankruptcy Clerk the sum of $2,700.00, representing the monthly payments of $450.00 each which have accrued since the pretrial hearing and, if this order is appealed, he shall continue to make monthly payments of $450.00 each to the bankruptcy clerk until this order shall have become final or it shall be reversed and rendered.

4. When this order and the judgment based on this order have become final, the bankruptcy clerk pay over to Rachel Chandler the sum of $2,700.00, (or such larger sum which results from additional monthly payments if the order is appealed) representing the payments which Richard Laverne Chandler should have made to Rachel Chandler

since November, 1984; and

5. Those monies totalling $2,700.00, when received by Rachel Chandler, shall be credited against the nondischargeable judgment.

All relief not herein granted is denied.

The Clerk is directed to file this Judgment and to furnish a copy to the attorneys of record.

Entered this 26th day of April, 1985.

/s/ Bill H. Brister
BANKRUPTCY JUDGE

APPENDIX H

IN THE UNITED STATE COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1764

IN RE: RICHARD LAVERNE CHANDLER, Debtor.

RICHARD LAVERNE CHANDLER,
Plaintiff-Appellant,

versus

RACHEL CHANDLER,
Defendant-Appellee.

- -

Appeal from the United States District Court

for the Northern District of Texas

- -

Before RUBIN, JOHNSON, and JONES, Circuit Judges

BY THE COURT:

Petitioner Richard Chandler moves this Court for a stay of the district court's order affirming a bankruptcy court ruling that his obligation to pay his former wife Rachel a share of his military retirement pay has not been discharged

in bankruptcy. Specifically, he seeks enforcement of the provision of the bankruptcy court order, which was affirmed in toto by the district court, specifying that the disputed funds should be paid to the clerk of the bankruptcy court during any appeal. Chandler also moves this Court to vacate the order of the bankruptcy court and dismiss his wife's action based on lack of federal jurisdiction. Both motions are DENIED.

Chandler has not properly moved the district court for a stay. The purported motion for a stay was encompassed in a single paragraph in a motion captioned "Motion for Leave to Proceed on Appeal in Forma Pauperis." It requested the district court, which had affirmed the entire judgment of the bankruptcy court, to affirm the portion of that judgment that allegedly granted a stay. It advanced no arguments in support of granting a stay. The arguments Chandler now advances in support of the stay either were not placed before the district court at all or were advanced in what was captioned as a "Motion for Contempt." The Motion for Leave to Proceed in Forma Pauperis which contained the

motion for a stay could property be denied, as this Court found, on the basis that Chandler is not a pauper. Under these circumstances, the district court's failure to rule on the purported motion for a stay was not surprising. In substance, no such motion was properly placed before the court.

A stay much ordinarily be sought in the first instance in the district court. Fed. R. App. P. 8(a). This Court will grant such a motion only upon a showing that the district court has refused to, or will not, grant such a stay. Id. Chandler has made no such showing. Nor can he provide this Court with the "district court order granting or denying a stay, and the statement of reasons for its action." 5th Cir. Local Rule 8.1.1 f. Having failed to obtain a ruling on his purported motion from the district court because of his failure to articulate his claim intelligibly, he cannot now by-pass the district court and obtain a ruling from this Court. Fed. R. App. P. 8(a).

Mr. Chandler also moves this Court to vacate the order below and dismiss Rachel Chandler's complaint. He bases

this motion on his claim that no federal court has jurisdiction over this action because it is related to an ongoing domestic relations dispute. Unlike cases where this Court has recognized the so-called domestic relations exception, jurisdiction in this case is not based on diversity. C.F. Brown v. Hammonds, 747 F.2d 320, 322 (5th Cir. 1984). Federal jurisdiction is based on 28 U.S.C. § 1471(e) which specifies that "[t]he bankruptcy court in which a case under Title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case." Mr. Chandler has not shown why Rachel Chandler's action, commenced to except her rights to a share of his pension from the discharge he sought in bankruptcy court, falls outside the reach of this statute. When Mr. Chandler sought the protection of the federal bankruptcy court, he granted it jurisdiction over his property, including his military pension. He has not shown why, having obtained that protection, he is now free to escape that jurisdiction.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

IN RE: RICHARD CHANDLER	)	BANKRUPTCY NO. 584-50184
RICHARD LAVERNE CHANDLER	)	ADVERSARY NO. 584-5105
v.	)	CIVIL ACTION NO. CA-5-85-120
RACHEL CHANDLER	)	

ORDER

This matter came before the court on appellant Richard Chandler's motions to vacate, to dismiss the complaint, and to find the appellee and the United States Army in contempt.

This is a bankruptcy appeal. Appellant appealed the bankruptcy court's order in Adversary No. 584-5105. The bankruptcy court found that the appellee, Rachel Chandler; was entitled to receive $450.00 of appellant's monthly military retirement award as her separate property pursuant to a divorce decree terminating the parties' marriage. In the alternative, the bankruptcy court found that appellee's portion of the award also could be upheld as non-

dischargeable support according to §523(a)(5) of the Bankruptcy Code. On October 31, 1985, this court affirmed the bankruptcy court's order, finding no abuse of discretion in the bankruptcy court's rulings.

Upon review of the briefs and the law, the court is still of the opinion that the bankruptcy court had jurisdiction of the action, and that the court's order should be upheld. Thus, the court finds no basis for appellant's motion to vacate this court's order of October 31, 1985, and to dismiss appellee's complaint in Adversary No. 584-5105.

With respect to the motion for contempt, appellant seeks to argue on appeal what he failed to raise in the bankruptcy court. Thus, the court finds no basis for considering appellant's motion for contempt.

Accordingly, appellant's motion to vacate, to dismiss the complant, and to find the appellee and the United States Army in contempt are denied.

The Clerk will furnish a copy hereof to each attorney and necessary party.

ENTERED this 3rd day of March, 1986.

/s/ Halbert O. Woodward
HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

APPENDIX J

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

LUBBOCK DIVISION

IN RE: RICHARD CHANDLER	)	
Debtor	)	NO. 584-5184
RICHARD LAVERNE CHANDLER	)	
Plaintiff	)	ADVERSARY NO. 584-5105
	)	CIVIL ACTION No. CA 5-85-120
RACHEL CHANDLER	)	
Defendant	)	

ORDER

It is here ORDERED that the parties shall file briefs in the above case in strict accordance with Rule 8009 of the Federal Rules of Bankruptcy which are here referred to. In the event any party fails to provide a brief timely as provided in the rules, the court will conclude that such defaulting party consents to the entry of an order adverse to such defaulting party's position.

The Clerk will furnish a copy hereof to each attorney

and necessary party to this cause.

ENTERED this 17th day of June, 1985.

/s/ Halbert O. Woodard
HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

APPENDIX K

This appendix contains pertinent parts of the following constitutional provisions, statutes, regulations, Federal Rules of Civil Procedure and Bankruptcy Rules: U.S. Constitution, Article III and Amendment V; Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. 98-353, 98 Stat. 341; 28 U.S.C. §§1471 (Repealed), 1334, 451, 157, 158; 11 U.S.C. §§523, 362; Uniformed Services Former Spouses' Protection Act, codified in 10 U.S.C. §1408 and its implementing regulation 32 C.F.R. §63; Federal Rule of Civil Procedure, Rule 43 and, Bankruptcy Rules, Rule 8009 and 8013 (full text copied at page 18):

CONSTITUTIONAL PROVISIONS

Article III

Section 1. Supreme Court and inferior courts--Judges and compensation.

The judicial Power of the United States, shall be vested in the Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and Inferior Courts, shall hold

their offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during the Continuance in Office. * * *.

Amendment V

No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

STATUTES

TITLE 28

§1471. Jurisdiction (Repealed)

(a) * * *

(c) The bankruptcy court for the district in which a case under Title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts. * * *.

(e) The bankruptcy court in which a case under Title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case

§1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under Title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceeding arising under Title 11, or arising in or related to cases under Title 11. * * *.

(d) The district court in which a case under Title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such, and of property of the estate.

§451. Definitions

As used in this title:

The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title * * * the

judges of which are entitled to hold office during good behavior.

* * *.

The term "judge of the United States" include judges of the court of appeals, district courts * * * the judges of which are entitled to hold office during good behavior.

* * *.

§157. Procedures

(a) Each district court may provide that any or all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 shall be referred to the bankruptcy judges for the district.

(b) (1) Bankruptcy judges may hear and determine all cases under Title 11 and all core proceedings arising under Title 11, or arising in a case under Title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under Section 158 of this title.

(2) Core proceedings include, but are not limited to -

(A) matters concerning the administration of the estate;

(B) * * *.

(G) motions to terminate, annul, or modify the automatic stay;

(H) * * *.

(I) determination as to the dischargeability of particular debts;

(J) objections to discharges;

(K) * * *.

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor - creditor * * *.

(3) The bankruptcy judge shall determine, on the judge's own motion * * * whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to the case under Title 11. * * *.

(c) (1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under Title 11. In such proceeding, the bankruptcy judge

shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) * * *.

§158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, * * * of the bankruptcy judges under section 157 of this title. * * *.

§151. Designation of bankruptcy courts

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under * * * by rule or order of the district court.

TITLE 11

§362. Automatic Stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title * * * operates as a stay, applicable to all entities * * *.

§523. Exceptions to Discharge

(a) A discharge under section 727 * * * of this title does not discharge an individual debtor from any debt * * *

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with state or territorial law by a governmental unit, or property settlement agreement * * *.

TITLE 10

§1408. Payment of retired or retainer pay in compliance with court orders.

(a) In this section:

(1) "Court' means -

(A) * * *

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; * * *.

(2) "Court order" means a final decreee of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulement, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which -

(A) is issued in accordance with the laws of the jurisdiction of the court;

(B) provides for -

(iii) division of property (including a division of community property); and

(C) specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay or

a member to the spouse or former spouse of that member. * * *

(6) Spouse or former spouse means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to the member.

* * *.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made under this section to the extent that they include and amount resulting from the treatment by the court * * *.

32 C.F.R. S 63. IMPLEMENTING INSTRUCTIONS FOR 10 U.S.C. §1408

32 C.F.R. §63.6 Procedures.

(a) Eligibility of Former Spouse. (1) A former spouse of a member is eligible to receive direct payment from the

retired pay of that member only pursuant to a court order that satisfies the requirements and conditions specified in this part. In the case of a division of property, the court order must specifically provide that payment is to be made from disposable retired pay.

(2) For establishing eligibility for direct payment under a court order that provides for a division of retired pay as property, a former spouse must have been married to the member for 10 years or more, during which the member performed 10 years or more creditable service. * * *.

(6) For court orders that provide for the division of retired pay as property, the following conditions apply: * * *

(iii) The court order or other accompanying documents served with the court order must show the former spouse was married to the member 10 years or more, during which the member performed at least 10 years of creditable service.

(7) Court orders awarding a division of retired pay as property that were issued before June 26, 1981, shall be

honored if they otherwise satisfy the requirements and conditions specified in this part. A modification on or after June 26, 1981, may be honored for subsequent court ordered changes made for clarification, such as the interpretation of a computation formula in the original court order. For court orders issued on or after June 26, 1981, subsequent amendments after that date to provide for a division of retired pay as property are unenforceable under this part. * * *.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 43

(a) Form. In all trials the testimony of witnesses shall be taken orally open court, unless otherwise provided * * *.

(b) * * *

(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the representative parties, but the court may direct that the matter be heard wholly or party on oral testimony or disposition. * * *.

BANKRUPTCY RULES

Rule 8009

(a) Briefs. Unless the district court or the bankruptcy appellate panel by local rule or by order excuses the filing of briefs or specifies different time limits: * * *

Rule 8013

The full text of this Rule has been copied in full at page 18 of this writ.